No. 3001

United States
Circuit Court of Appeals
For the Ninth Circuit

RALPH H. CAMERON, NILES J. CAMERON, B. A. CAMERON, S. P. PEPIN, and L. L. FERRALL,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Brief of Appellants

Upon Appeal from the United States District Court for the District of Arizona

ROBERT E. MORRISON,

J. E. MORRISON,

Solicitors for Appellants.

ARIZONA STATE PRESS, PHOENIX, ARIZ.

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IN THE UNITED STATE CIRCUIT COURT OF APPEALS.

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STATEMENT OF CASE

The appellee, in its anmended bill of complaint, among other things, alleges that it is the owner of certain lands situate in Coconino County, State of Arizona, the same lands as those included within the Cape Horn Lode mining claim, notice of location whereof is of record in the the office of the County Recorder of said County, in Book 4 of Mines, page 106, and as described in the patent survey thereof, No. 2023, filed in the office of the United States Surveyor General for Arizona; that said lands, with others, on February 20th, 1893, were, by proclamation of the President, pursuant to Act of Congress, approved March 3rd, 1981, (26 Stat. 1905), withdrawn and set apart as the Grand Canyon For-

est Reserve, and that said lands, ever since said February 20, 1893, have been a part of the National Forests of the United States, and are now a part and parcel of the Tusayan National Forest, established June 28th, 1910, by proclamation of the President, pursuant to the aforesaid Act of Congress, and the Act of Congress approved June 4, 1897, (30 Stat. 11). That the said lands, with the exception of a strip of about seventy-five feet in width, were, with other lands, on January 11th, 1908, further withdrawn and set aside as a part of the Grand Canyon National Monument under the Act of Congress approved June 8, 1906, (34 Stat. 225), and that said lands, ever since January 11, 1908, have been and now are, a part of the said Grand Canyon National Monument; that said Grand Canyon is an object of great scientific and scenic interest, and is visited by thousands of people each year; that the said lands constitute a very important part of said Monument as they are upon the southern rim of said Grand Canyon, enclose the head of Bright Angel Trail, the principal means of access to the bottom of said Grand Canyon, and are adjacent to the railroad terminal and the principal hotel buildings, and should be open to the free and unobstructed access, at all times, of the public, and

to the unhampered administration by the officers and agents of the appellee, for the protection and accommodation of the large numbers of persons desirous of viewing the great scenic and scientific wonders of the said Grand Canyon; that on April 10th, 1902, the defendant, Ralph H. Cameron, in pretended compliance with the mining laws of the United States, located the said lands of the appellee, as the Cape Horn Lode mining claim, and on February 23, 1904, made an amended location thereof. That on May 17th, 1905, the said Ralph H. Cameron filed his application for patent on said Cape Horn Lode mining claim, with the Register and Receiver of the United States Land Office, at Prescott, Arizona; that thereafter a protest against said application was made, and a hearing had, at which said Ralph H. Cameron appeared, and introduced evidence in support of said mining claim, and in support of his application for patent thereon; that on February 11, 1909, the Secretary of the Interior held that no discovery of mineral had been made within the boundaries of said mining claim; that the land embraced in said mining claim was not mineral in character, and the said Secretary of the Interior rejected the said application for patent, held the location of the said Cape Horn Lode

mining claim to be null and void, and held the lands therein embraced, to be a part and parcel of the said Grand Canyon National Monument; that the First Assistant Secretary of the Interior thereafter denied a motion for review of the said decision, and that the General Land Office, on April 3rd, 1912, declared the said decision to be final, and finally annulled the location of said Cape Horn Lode mining claim, and declared the lands covered thereby to be a part of the aforesaid Grand Canyon National Monument; that thereafter, the said Ralph H. Cameron filed a second application for patent on the said Cape Horn Lode mining claim, and thereafter, on August 4th, 1915, the Secretary of the Interior, by reason of the said previous decision, held that the said mining claim had no legal existence, and denied said application for patent; that the said appellant, Ralph H. Cameron, notwithstanding said decisions, has continued to assert, and does assert, the right to the exclusive use and occupancy of the aforesaid lands, thereby preventing the appellee from causing to be constructed thereon improvements greatly needed for the convenience and protection of the public desirous of viewing the said Grand Canyon; that the appellee by reason of said asserted right, and by reason

of suits instituted, threats made, and violence offered by said Ralph H. Cameron, and others of said appellants, persons holding or desirous of securing permits from appellee to occupy and use portions of the aforesaid lands for the purpose of conducting thereon enterprises for the convenience of the public, have been prevented from going upon or occupying said lands, and have been forcibly ejected therefrom and deterred from securing permits, as aforesaid; that the appellants have constructed numerous buildings on the said lands, all within the said Tusayan National Forest, and, with the exception of two of said buildings, all within the said National Monument, all of the said buildings having been constructed since the withdrawal of said lands as a part of the Grand Canyon Forest Reserve; that some of said buildings have been enlarged, and that new buildings have been erected on said lands by appellants B. A. Cameron, L. L. Ferrall and S. D. Pepin, in the years 1914 and 1915, and after the aforesaid decisions of the Department of the Interior, and that notwithstanding said decisions, the said appellants maintained, and were at the time of the filing of said complaint, maintaining the said buildings on said lands, and occupying the same

as residences, and for the purpose of conducting therein and on said lands, livery and other business enterprises; that said appellants used said lands and buildings for the conduct of livery businesses in the years 1914 and 1915, which said businesses were being conducted on an extensive scale at the time of the filing of the complaint; that the appellants had permitted to accumulate around said buildings, and at or near the rim of the said Grand Canyon, large deposits of stable manure, garbage, and other refuse, to the great annoyance and discomfort of the public, and thereby greatly detracting from the scenic beauties of the said Grand Cayon; that on September 19th, 1913, the said Ralph H. Cameron was formally offered a free special use permit authorizing the occupancy of said lands on which the said buildings are located; that said Ralph H. Cameron, on December 4th, 1913, declined to accept said permit, stating it was issued without his consent, against his wishes, and that he did not recognize the necessity of such permit: that on August 3rd, 1915, said permit was revoked; that the said Ralph H. Cameron, pretending to do the annual assessment work on said lands, had excavated, cut, tunnels and shafts in the said lands, and that he gave out and threatens that

he intends to continue said excavating and pretended mining operations, in violation of the laws and regulations governing National Monuments, thereby irreparably damaging that part of the rim of the Grand Canyon, and of the said National Monument most accessible to, and most frequented by the public; that all of the said acts and doings of the appellants were, and are, against the wishes, and without the consent of the appellee, and in violation of the rules and regulations of national forests and national monuments, in violation of law, and in disregard of the rights and duties of the appellee, thereby appropriating to appellants' private use the said lands which had been, as aforesaid, set aside as and constitute a very important part of the Grand Canyon National Monument, and which said lands should, of right, be open to the free and unobstructed access of the public, and to the unhampered administration of the proper officers of the appellee, and that said acts and doings of the appellants, amounted to a continuing tresspass, a purpresture, and a public nuisance; that during the summer of 1915, a large increase in number of persons visited the said Grand Canyon, and it was necessary, in order to afford adequate conveniences, for appellee to issue a large number of

permits authorizing the conduct of livery businesses within said National Monument, and to put into effect a closer supervision over, and regulation of, such livery and other businesses, conducted within said National Monument, and over and of said National Monument, and that the acts and doings of the appellants, complained of, and their interference, greatly hampered the appellee in such additional supervision and regulation; that appellee had no plain, adequate and speedy remedy at law;

The appellee, in said complaint, prayed a temporary injunction, restraining the appellants from occupying, using, or asserting any claim or right to the occupancy, use or possession of the said lands and the said mining claim, and from interfering with the administration and use of said lands by the appellee, and its permittees, or the public, and from making further excavations on the said lands, which said application for temporary injunction, was denied; the appellee in the said complaint further prayed that said temporary injunction be made permanent; that appellants be ordered to remove all buildings and structures, and all deposits of filth and refuse, and to place said lands as nearly as possible in their natural condition, and that it recover its costs, and

for other and further relief; said bill of complaint was verified; (pp. 1-13, T. of R.).

Thereupon the appellants interposed a motion to dismiss said amended bill of complaint, for the reason that the same, and the allegations therein contained, did not constitute any ground for equitable relief, and for the futrher reason that the matter attempted to be litigated, was the right of possession of the said lands, and the recovery of such possession could only be litigated in an action at law, and, thereupon, appellants interposed a motion to transfer said suit to the law side of the court, in the event that said motion to dismiss should be denied, (pp. 30-31, T. of R.); that thereafter the said motion to dismiss was overruled, and exception taken by appellant, and, the motion to transfer to the law side of the calendar was overruled, and exception of appellants duly made and noted, ((p. 32-33, T. of R.); and thereupon the appellants filed their answer to the said amended bill of complaint denying, under oath, that the appellee was the owner of said lands, alleging that appellant Ralph H. Cameron, made a due, lawful, valid location, under the mining laws of the United States, of the said Cape Horn Mining claim, on April 10th, 1902, and that ever since said date, said lands were, and at the time

of the filing of the said answer, were, the property of and belonged to the said Ralph H. Cameron, by virtue of said valid mining locations, and, therefore, that said lands never became a part of the said Tusayan National Forest, or of the said National Monument, although the said lands were a part of the said Grand Canyon Forest Reserve; alleging that the proclamation of the President pretending to establish the said National Monument, was without authority of law, as said Grand Canyon is of no scientific interest, is not an historic land mark or prehistoric structure, or an object of historic or scientific interest in the sense intended by Congress in the meaning of said Act of Congress of June 8, 1906, but is merely an enormous canyon, two hundred miles in length, eleven to fourteen miles in width, and approximately one mile in depth. That said pretended National Monument is approximately sixty miles long, and approximately thirty miles in width, and is unnecessary for the care and management of the Grand Canyon, and that the limits of said pretended National Monument are not confined to the smallest area compatible with the proper care and management of the Canyon, and that, therefore, the pretended withdrawal of said lands, as within a National Monument, is void,

and does not affect the lands in question; admit that the lands in question are those described in the amended bill of complaint; deny that said lands should be free and unobstructed to access by the public and to the administration of the appellee, because said lands belong to said Ralph H. Cameron, and said public, and officers of appellee, have no right thereon, except by the permission of said Ralph H. Cameron; allege that said Ralph H. Cameron has always permitted all persons desiring to observe the Grand Canyon, at all times, free and without inconvenience, charge or obstruction, whatsoever, to come upon said lands; admit that the said Ralph H. Cameron located the said ground as the Cape Horn mining claim, and allege that said location was a good, valid and lawful location, on said April 10, 1902, said Cameron having, at that time, fully complied with all the lawful requirements relating to the valid location of lode mining claims, and had performed the lawful assessment work each year after such location, to and including the year 1915, during each of said years, in the doing of said assessment work, making good and sufficient discoveries of mineral bearing rock in lodes and place, any of which said discoveries were sufficient to sustain the said location from the

date of such discoveries; admit that said Cameron filed application for patent, that protest was made, that hearing was had at which said Ralph H. Cameron appeared and introduced evidence to sustain his application, but deny that he ever introduced any evidence to sustain his location for mining claim, the sole matter at issue being whether or not the Land Department would grant his application for patent; admit that the Secretary of the Interior made a pretended and unauthorized holding that the "land was not mineral in character" wholly immaterial to the matter at issue; admit that the Secretary of the Interior rejected said application for patent, and attempted to hold said mining claim null and void, and also attempted to hold the said lands a part of the said National Monument, but allege that the actions of the said Secretary in attempting to hold said mining claim null and void was, itself, void, null and of no effect, as was his action in attempting to hold the lands a part of the National Monument, as the said Secretary had no power, jurisdiction or right, to hold said mining claim null and void, nor had the Department of the Interior, or any of its officers or bureaus any such power, jurisdiction or right, because neither said Secretary nor Department possess any functions to

cancel, or hold null and void, any mining claim location, as such question is a judicial one and not determinable by said Secretary or Department, and for the further reason, that the validity of the said mining claim and location ,was not before the said Department nor the said Secretary, as the sole question presented by the application for patent, or otherwise, was whether a patent should, or should not, issue, and for the further reason that the question of whether or not a mining location is valid, is a judicial one, of and concerning the title to real estate, and, therefore, can only be litigated and determined in a court of law, before a lawful jury, if demanded; that the said pretended holding of the said Secretary, was an attempt to take the property, i. e., the mining claim or location, from the said Ralph H. Cameron, without due, or any, process of law, and to deprive him of his constitutional right to the trial of the said title by a jury, and for the further reason that the said pretended holding was based upon a finding that the "Land is non-mineral in character", which is not a valid ground for holding a mining claim or location void, because it is immaterial whether the *land* is non-mineral in character, as it is the mineral deposit which is the subject of location under the mining laws, and

for the further reason that the evidence before the Secretary overwhelmingly proved that there had been sufficient discovery of mineral bearing rock in place, on said grounds, prior to said location, and at numerous dates thereafter prior to the establishment of said National Monument, to sustain the validity of the said location, even if not sufficient, in the view of the Secretary, to justify the issuance of a patent; and for the further reason that the Secretary made no finding of fact which was a lawful reason to hold a mining claim or location null and void, even had he both the power and jurisdiction so to hold; allege that all of the said Secretary's actions were, therefore, null and void; admit that said Ralph H. Cameron continued to assert that he had the right to the exclusive use and occupancy of said lands, because he was the owner thereof under said mining location and claim; denies that the assertion of said right prevented the appellee from constructing improvements thereon; alleges that neither the appellee, nor any of its agents, ever attempted to place any improvements thereon, which would have been unnecessary, as the said Ralph H. Cameron had long since placed all such improvements as are mentioned in the amended complaint, upon said ground, permitting them

and the said grounds, to be freely used by any persons desiring to view the said Canyon; deny any threats of violence, or that anyone was ever prevented from going upon said land; deny ever having forcibly ejected anyone from said ground, or deterred anyone from securing permits from the appellee; admit the institution of one suit in the Superior Court of Coconino County, Arizona, to maintain and protect his title; admit that appellants have occupied the buildings in said complaint described; deny that any amount of manure, or other refuse, was allowed to accumulate on said ground; allege that the premises were always kept in a clean and sanitary manner; admit that said Ralph H. Cameron excavated cuts, tunnels and shafts upon the said ground in said Cape Horn mining claim in the doing of his annual assessment work thereon, and that he intended continuing so doing for the purpose of maintaining his title to said mining claim location; denies that such work in any way damages the rim of the Grand Canyon; denies that his said work, or any actions on his part complained of, are in violation of any rules or regulations whatsoever, of the appellee, as the same cannot apply to the said lands, the same being the private, individual property of appellant, Ralph H. Cam-

eron, under his said mining claim and location, and deny that the appellants, or any of them, have done any act whatsoever, nor could they have done any acts whatsoever, upon the said ground in question, amounting to a continuing trespass, purpresture, and public nuisance, as the said lands do not belong to said appellee, but are the private individual property of the said Ralph H. Cameron; allege that all of the appellants assert that said Ralph H. Cameron, since the location of said mining claim, has been in the actual, physical possession, of said land, under title claim of title, color of title, and claim of right, by virtue of said mining claim and location, and that the appellants, other than said Ralph H. Cameron, claim no right, title or interest whatsoever in said lands, and ask that said complaint be dismissed as to them; allege that permit was offered to said Ralph H. Cameron, as set forth in said complaint, and that he refused the same because there was no necessity therefor, and allege that it would have been an idle and dangerous action for him to have accepted such permit to occupy and use his own land; deny that there was a large increase in number of persons visiting the Canyon in 1915, and that it was necessary for the appellee to issue and keep in effect such a large number of per-

mits, and to put into effect closer supervision, as alleged in said complaint, and deny that the acts of the appellants have, in any way, hampered, or were hampering, the appellee in such additional supervision and regulation, and deny that appellants ever interfered with the administration of any land belonging to the appellee, and deny all allegations in said complaint, except those specifically admitted. Appellants prayed that said complaint be dismissed, and that they go hence without day.

And for a further separate defense, the appellant, Ralph H. Cameron, asserted that he had lawfully located the grounds in question by virtue of said Cape Horn mining claim, had made lawful discovery, prior and subsequent to said location, had done the annual assessment work down to and including the year 1915, and had complied with the laws, Federal, Territorial and State, in relation to mining claims, in every particular; that the appellant claimed some right adverse to his title in said lands, and prayed that the question be adjudicated, and that he be declared the owner of, and entitled to possession of the said ground, by virtue of said mining claim, and that the appellee be debarred from claiming any right therein adverse to him; to

which said separate defense, the appellee never interposed any defense or plea whatsoever, upon the trial of the case the appellee offered in evidence certified copies of the said applications for patent, and various rulings and decisions of the Secretary and General Land Office, to the introduction of which appellants objected on the ground that they did not, in any way, affect any of the issues in the case, and that the Secretary of the Interior had no jurisdiction or power to cancel the location of the Cape Horn mining claim, which objections were by the Court overruled, and exceptions duly taken by appellants, (p. 36, and pp. 83-85, T. of R.). The appellants, under stipulation of counsel, as to the manner and form of the evidence, offered, to sustain the allegations of their answer, the statement of evidence excluded by the court (p. 54-82, T. of R.), to which the appellee objected on the ground that the Court was bound and concluded by the decisions of the Secretary of the Interior annulling the Cape Horn mining claim, and that the court could not permit the introduction of any evidence on the part of the appellants for that reason, which objection was sustained, and the appellants duly excepted to the ruling of the Court,

(p. 54 T. of R.). Thereupon the Court made and entered its decree, (pp. 39-42 T. of R.) in favor of the appellee enjoining the appellants from occupying, using or asserting any claim to the lands in question; from making any excavation whatsoever in said lands, requiring them to remove all deposits of filth, manure and refuse and the said buildings and structures. Appeal was properly taken by appellants to this court, and supersedeas issued.

The questions involved are the following:

1. Does the Secretary of the Interior possess any right, authority, function, or power, to cancel, annul or hold void, a lode mining location and claim, and are not his decisions attempting so to do, above referred to, null and void?

2. Did the Secretary of the Interior make any finding of fact which is a valid, lawful ground for holding a mining location null and void, even had he the power so to do?

3. Did the trial court not commit error in refusing to admit in evidence the statement of evidence excluded (p. 54-82 T. of R.)?

4. Did the trial court not commit error in failing to pass upon the second defense of appellants, and enter judgment in accordance therewith?

SPECIFICATION OF ERRORS

I.

That the United States District Court for the District of Arizona erred in over-ruling the motion to dismiss, interposed by the appellants to the complaint filed in this cause, for the reason that the allegations, in said complaint contained, do not state or allege facts sufficient to constitute a cause of action in equity against the appellants, or either of them, or to constitute sufficient grounds in equity for the relief prayed for in the said complaint, as it appears upon the face of said complaint that the Secretary of the Interior, without any power or authority of law whatsoever, and possessing no function so to do, assumed to make certain pretended findings, judgments, orders, and decisions, purporting to cancel and annul a mining location, towit, the Cape Horn Mining Claim, fully described in the answer of appellants; and further, attempting to restore the land embraced within the boundaries of said mining location to the public domain, and to make it a part of the Tusayan National Forest.

II.

That the said United States District Court erred in admitting in evidence, over the objec-

tion of the appellants, the certified copies of the opinions, decisions, orders, and adjudications of the Secretary of the Interior of the United States, which purported to cancel and annul the locations of the Cape Horn mining claim, fully described in the bill of complaint and answer herein, and attempting to restore the land embraced within the boundaries of the said Cape Horn Mining Claim to the public domain; and in holding and declaring said ground to be a part of the Tusayan National Forest, for the reason that the said Secretary of the Interior had no right, authority, or jurisdiction whatsoever, and possessed no function to annul or cancel the mining location, and particularly not the mining location know as the Cape Horn Mining Claim.

III.

That the Court erred in refusing the offer of the appellants to introduce the testimony of R. H. Hetherington, Ralph H. Cameron, S. D. Pepin, and Leo Kruskop, for the reason that the said testimony of the said witnesses would have tended to establish the validity of the said Cape Horn mining location, as will fully appear from the transcript of said evidence submitted to the United States Circuit Court of Appeals for the 9th Circuit, on this appeal.

IV.

That the said United States District Court erred in rendering, making, and entering its final decree in this case, for the reason that the said decree is contrary to the law, particularly as the said decree is based in part (and practically entirely) upon the said decisions, findings, rulings, and orders of the said Secretary of the Interior, which were and are absolutely void and of no effect, the said Secretary of the Interior possessing no right, authority, power, jurisdiction, or function to make any such decisions, findings, rulings, and orders.

V.

That the said United States District Court erred in rendering, making, and entering its decree in this cause, because the same is contrary to the facts, which show, demonstrate, and prove that the said Cape Horn Mining Claim, from the date of its location to and including the date of the said decree, was and is a valid mining location.

VI.

That the said United States District Court erred in over-ruling appellants' motion for a

new trial, for the reasons, set forth in each and all of the foregoing assignments.

ARGUMENT

First: Under this heading we combine the first, second, fourth and sixth specifications of error, as each of them involve the question of whether the Secretary of the Interior, the Department of the Interior, or any of its bureaus or officers, have jurisdiction and power to cancel and declare null and void, the location of a mining claim, when the owner thereof has made application for patent to the same.

It is the contention of appellants that any such action on the part of said Secretary, said Department of interior, or any of its bureaus or offices, or on the part of the Commissioner of the General Land Office, is wholly without authority, jurisdiction or power, and is therefore null and void, as such officers, departments and bureaus possess no function to cancel the location of a lode mining claim, the question involved being one of title to real estate, a judicial question, not determinable by any such officer, department or bureau, but which can only be litigated in the courts of the land.

It will be conceded that after the location of a mining claim there are two titles, one the title by possession acquired by the locator under his location, the other the fee simple title resting in the Government.

The title by possession is a granted, established and vested right, and gives to the locator or owner of an unpatented mining claim, without there being any necessity for any application of any kind to the government, the absolute power to sell, mortgage, or will the property, to extract from the mining claim, and dispose of the same, any and all kinds of mineral wealth which it may contain, independent of governmental supervision or control.

This title is of such a substantial character that the owner of such a mining claim is not required by law at any time to go into the United States Land Office or any other Department for any purpose connected therewith.

It would be burdening the Court to cite any authorities in support of the above proposition, as we do not think there are any cases in opposition to the principles above involked.

In the decision in Ex Parte Nichols and Smith, which was rendered by A. A. Jones, Assis-

tant Secretary of the Interior, on the 24th day of October, 1913, it is held that the Land Department has no jurisdiction or power to declare null and void a location, upon the ground that there has been no discovery of mineral upon the land claimed as an unpatented mining claim, and in his opinion Secretary Jones says that the decision in the Yard case 38 L D 50, is "entirely indefensible whether viewed from an administrative or legal standpoint."

This position is also sustained in a recent decision of Judge Anderson in the Supreme Court for the District of Columbia, in Cameron vs. the Secretary of the Interior and Commissioner of the General Land Office.

In both of these cases, however, no application had been made to the Land Office for acquiring the fee simple title of the government.

In the case at bar, application was made by Cameron for patent to the Cape Horn claim, and in addition to rejecting the application the Land Office went a step further and by its decision cancelled and held void the location of this mining claim made by Cameron; and it is claimed by the ~~defendant~~ in this case and counsel for the government that because of this application

for patent, the applicant submitted himself to the jurisdiction of the Land Department for all purposes, and that the declaration of cancellation of the mining claim is binding upon him, and he cannot now and in this case question the jurisdiction and power of that department to cancel his location.

The contention of the appellant is that the Land Department or Secretary of the Interior had authority to grant or reject the application for patent, but neither had any authority whatsoever to destroy or in any way interfere with the separate, distinct, and independent title already held by the locator under his location, or to determine whether or not the locator had performed the acts necessary to constitute a valid location. A title being claimed in good faith, the courts, and not the Secretary or Land Department, have the exclusive right, power and jurisdiction to determine whether such title exists or not.

Upon discovery (as defined by the Courts wherein the amount or value is considered immaterial) and performing of all the acts of location required by law, a complete possessory title vests in the locator; "when these requirements have been complied with, the land is no longer Public, but the possession, the right to

possession, and the right to acquire the title are IRREVOCABLY VESTED in the locator."

Erwin v. Parego 93 *Fed.* 608

It has yet to be claimed that the Land Department is a Court. Only Courts have power to try title and to try any question as to whether title exists or not, or for that matter rights of possession to mineral ground or otherwise.

The extraordinary proposition is here advanced that the grantor, or one who is claimed to be the grantor of title, may himself decide the question whether he has granted the title or not.

When Cameron applied for patent to the ground in dispute, he submitted his claim to the jurisdiction of the Land Office solely to have the question determined whether such patent should issue to him or not; that was the only issue which was presented for determination. He did not by such action submit to the Department the question whether he had title by possession under his location, and as has been heretofore stated that department has no jurisdiction or function which empowers it to decide the question of title under the location made by Cameron.

When the department by its decision rejected

Cameron's application for patent it exhausted its power.

No Court, much less a Department of the Government, can render judgment in any case which is not based upon the issue presented by the pleadings and papers therein. Such a judgment has no force or effect.

The order of cancellation made by the Land Office and affirmed by the Secretary in Cameron's application for patent, is based upon the question whether the land is mineral or non-mineral, and whether a discovery under the rules and regulations of the Land Department had been made.

It is well known that when an application is made for patent the Land Department requires its regulations relating to the mineral character of the land to be complied with, that is the applicant must convince the Department that the ground for which patent is asked contains mineral of commercial character, that it is of such a nature that it will justify a reasonable person in the expenditure of money in developing the same. In other words, the rule of the Department is that at the time when the application is made the ground must be developed to such an extent as to show practically that it is a paying

proposition; and we have no quarrel with this rule so long as it is held applicable only to the allowance or rejection of patent. It is within the rules of reason that the government, through its Land Department may lay down such regulations as it may deem wise and proper and require proof thereunder before permitting the fee simple title to be passed out of the government. But when this Department attempts to make its rule with reference to discovery applicable to such an extent as to go into another field of investigation, to-wit: to determine the title to the location of the claim itself, then it has stepped beyond its rightful domain of activity, for the reason that in determining the question whether a discovery of mineral has been made under a location notice another rule, than that of the Land Department in determining whether the patent should issue or not, has been established clearly and distinctly by the Courts.

A discovery upon which the Land Department might rightfully refuse to issue a patent may nevertheless be absolutely sufficient to sustain the location. The rule with reference to the discovery of mineral as laid down by the Courts is as follows: "When the locator finds rock in place containing mineral he has made a

discovery within the meaning of the statute, whether the earth or rock is RICH OR POOR, whether it assays HIGH OR LOW."

Book v. Justice Co.
58 Fed 106-120.

Reference is made to the general law and Court rulings on this subject as found in

Article III Lindley on Mines 3d Ed. Par. 335 et seq.

This learned author there discusses this question at length and in all of its phases, rulings of the Land Department, as well as of the Court.

On page 768, Lindley on Mines, 3d Ed., he says:

"TO HOLD THAT, IN ORDER TO CONSTITUTE A DISCOVERY, as the BASIS of the LOCATION, it must be demonstrated that the discovered deposit will when worked, YIELD A PROFIT, or that the LANDS containing it are, IN THE CONDITION in which they are discovered, MORE VALUABLE FOR MINING than for any other purpose, would be to DEFEAT THE OBJECT AND POLICY OF THE LAW."

Also at the same place:

"It may subsequently appear that the lands

are not of the quality which would JUSTIFY THE ISSUANCE OF A PATENT but THIS would not determine the VALIDITY OF THE LOCATION. A TECHNICAL DISCOVERY does not of itself establish the PATENTABLE mineral character of the land but is sufficient to SANCTION A RIGHT OF POSSESSION under the mining laws."

See also Page 769, Lindley on Mines:

NO COURT HAS EVER HELD that in order to entitle one to LOCATE A MINING CLAIM ore of COMMERCIAL VALUE, in either quantity or quality must first be discovered. SUCH A THEORY WOULD MAKE MOST MINING CLAIMS IMPOSSIBLE."

The attempt of the Land Department to cancel Cameron's Location was an effort to take his POSSESSORY TITLE without due or any process of law whatever, and as it is a title the Land Department cannot adjudicate concerning it at all.

The holding as to the discovery by the Secretary on Cameron's application for patent:

"Logically carried out would prohibit a miner from making any valid location until he had fully demonstrated that the vein or lode of quartz or other rock in place bearing gold or silver which

he had discovered, would pay all the expenses of removing, extracting, crushing and reducing the ore and leave a profit to the owner. If this view should be sustained it would lead to ABSURD, INJURIOUS and UNJUST RESULTS."

Lindley on Mines (2) pp. 769-70 (3rd Ed.)
Book vs. Justice M. Co.
Judge Hawley) 58 *Fed.* 106
Bonner vs. Meikle, 82 *Fed.* 697-703

If it had been the intention of the Federal Mining law that the Land Department should have the jurisdictional right to pass upon the possessory title to a mining claim, is it not a little extraordinary that when upon an application for patent an adverse is filed the Federal law requires the person adversing, within the statutory time, to bring suit against the applicant for patent in a COURT of competent jurisdiction to determine the right of possession, the right to the possessory title as between these parties. We submit that this Federal direction is of significant importance in considering the question here involved, and to our minds is of a convincing character and illustrative of our position that when the possessory title is in question the right thereto can be determined only in the Courts. We can not conceive of any principle of law

which would change the necessity for rival claimants being compelled to go to the courts to have the question of possessory title determined, and the situation which has arisen herein between the government itself and the applicant for patent as to this same possessory title. It is the same identical question which is involved in either of the cases. The only difference is as to one of the parties to the controversy being the government, an it does not strike us as being sufficient reason to change the forum for the determination of this right to title by possession that the government takes issue with the applicant Cameron. We insist that the rule should be the same in one case as in the other. If there is any difference, the reason for the determination of the question by the Courts is stronger in a case where the government is one of the parties to the litigation.

Right here permit us to suggest that jurisdiction cannot be conferred by the consent of the litigants and the mere fact that the owner of a mining claim makes application to the Land Office for patent cannot possibly enlarge the power of the Land Office, or the Interior Department, or give to it any jurisdiction or authority not conferred by statute.

We therefore contend that there are no court decisions upon the question which is presented to this Court, and we are not familiar with any Federal law or any rule or regulation of the Land Department even, which can be called to support the government in its position that the Land Department has jurisdiction to hear and determine the question of the validity of a mining location even in a case where an application for patent has been made.

We might remind the Court that departments have no powers that are not conferred on them by law, other than such as are necessary to enable them to execute the powers designated by the statute.

The Federal statutes contain no provision authorizing the Department of the Interior to cancel the location of a mining claim. It is only in connection with the granting or rejection of applications for patent that the statute brings mining locations within the purview of the Interior Department, and the right to cancel a location is in nowise essential or in any manner a part of the power to reject an application for patent. The conclusion appears to be that there is no theory upon which the Department has authority to cancel a mining location.

We think, therefore, that your honor will agree with us that the decision of the U. S. Land Office, affirmed by the Secretary of the Interior, holding that the said Cape Horn mining claim is null and void should not be admitted in evidence.

Before leaving this subject we wish to suggest the following language from Section 2325 R S U S: "If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be ASSUMED THAT THE APPLICANT IS ENTITLED TO A PATENT, upon the payment to the proper officer of five dollars per acre, * * *".

Does this not mean that when no adverse is filed to an application for patent, the activities of the Land Department are confined to questions affecting the regularity of the proceedings in the application for patent.

Second: The Secretary in finding that the *land* is non-mineral in character, reached a conclusion which is one of law and not of fact, and therefore not binding upon the Court, and which is not a ground, and could not be a ground for declaring a mining location void, for the reason that it is provided by Section 2319, of the Revised Statutes of the United States, that all valuable mineral *deposits* are declared to be free and

open to exploration purposes, and the lands in which they are found, to *occupation* and purchase. Therefore, whether the lands were non-mineral or not, is entirely immaterial. The attempted finding of the Secretary, also a conclusion of law, and not a finding of fact, concerning the discovery of mineral bearing rock on said claim, while sufficient to permit him, in his discretion, to reject the application for patent, is entirely insufficient to constitute such a lack of discovery as would invalidate the location itself of a mining claim. The difference between the Department rule on discovery, and the unquestioned rule of the courts, is fully discussed in the argument under the first heading hereof.

Third: The trial court was in error in refusing to admit in evidence the statement of evidence excluded (pp. 54-82, T. of R.) the objection to the same being solely that the Court was bound and concluded by the decisions of the Secretary annulling the said Cape Horn mining claim, an dthat the court could not permit the introduction of any evidence on the part of the defendant for that reason. While it will, of course, be conceded that the findings of fact of the Secretary, lawfully made, in a matter before him over which he has power, jurisdiction and

authority, are final, nevertheless, as before stated, the two findings upon which he based his decision, i. e., that the land was non-mineral in character, and that no sufficient discovery had been made, were conclusions of law, as they involved the construction and application of United States Mining Laws, and were made in a matter over which the Secretary had no power or jurisdiction, the said Secretary having no function to cancel a mining location, and, therefore, the said decisions were not final and binding upon the tria lcourt.

Fourth: The second defense of appellants was, in effect, a crossbill against the appellee, asking that the title of Ralph H. Cameron be adjudicated, and that he be decreed to be the owner of the mining claim in question, and the lands embraced within its boundaries. No answer or pleading of any kind, whatsoever, was ever made by the appellee thereto, and judgment and decree should have been entered in favor of the appellant, Ralph H. Cameron, thereon, the trial court did not, in any way, mentioning or disposing of said second defense in its said decree, or at all. The attention of the court is earnestly directed to the statement of evidence excluded, (pp. 54-82, T. of R.), which would have absolutely

proven all of the allegations of said second defense, had the trial court received the same in evidence, thus requiring a decree for appellant, Ralph H. Cameron, upon the said second defense, the allegations of which are confessed by the appellee by its failure to deny the same.

The appellants therefore submit that the decree of the lower court should be reversed, and that judgment and decree should be entered in this court, upon said second defense, that said Ralph H. Cameron, appellant, is the owner of the said Cape Horn Lode mining claim, and all of the lodes, mineral deposits, and lands within its boundaries, and that the appellee be debarred from ever asserting any title thereto adverse to the appellant, Ralph H. Cameron.

ROBT. E. MORRISON,
J. E. MORRISON,
Solicitors for Appellant.